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Supreme Court, U.S.
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No. 02-135

IN THE

Supreme Court of the United States

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, *et al.*,
Appellants,

v.

RICHARD VIETH, *et al.*,
Appellees.

On Conditional Cross-Appeal from the United States District Court for the Middle District of Pennsylvania

CONDITIONAL CROSS-APPELLEES' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

REASONS TO DISMISS 2

I. THE CROSS-APPEAL SHOULD BE DISMISSED .. 2

II. PARTISAN GERRYMANDERING CLAIMS ARE, AND SHOULD REMAIN, JUSTICIABLE 3

III. CONSISTENT WITH THE REQUIREMENTS SET FORTH IN *BANDEMER*, PLAINTIFFS IN THIS CASE ARE MEMBERS OF AN IDENTIFIABLE POLITICAL GROUP 5

CONCLUSION 8

TABLE OF AUTHORITIES

CASES Page

Branti v. Finkel, 445 U.S. 507 (1980) 7

Cook v. Gralike, 531 U.S. 510 (2001) 4

Davis v. Bandemer, 478 U.S. 109 (1986) . . . . . *passim*

Easley v. Cromartie, 532 U.S. 234 (2001) 6

Elrod v. Burns, 427 U.S. 347 (1976) 7

Republican Party of North Carolina v. Martin, 980 F.2d 943 (4th Cir. 1993) 6

Shaw v. Reno, 509 U.S. 630 (1993) 4

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 4

Washington v. Yakima Indian Nation, 439 U.S. 463 (1976) 2

Wesberry v. Sanders, 376 U.S. 1 (1964) 4

MISCELLANEOUS

Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) 2-3

Cross-appellees – plaintiffs in the district court – hereby respond to the Jurisdictional Statement on Conditional Cross-Appeal filed by Robert C. Jubelirer, *et al.* in No. 02-135 (hereinafter "cross-appellants"). This cross-appeal is unnecessary and improper. Cross-appellants won all the relief they sought when they filed their motion to dismiss plaintiffs' partisan gerrymandering claims. Because cross-appellants do not seek to modify the judgment below, they should have raised the arguments included here as alternative bases for affirmance of the ruling dismissing plaintiffs' partisan gerrymandering claims. As we show here, moreover, neither argument raised in the conditional cross-appeal is substantial. The Court should reject both arguments, note probable jurisdiction in No. 01-1873, and dismiss this conditional cross-appeal.

STATEMENT

Plaintiffs, in the case docketed as No. 01-1873,[1] have appealed an order of a three-judge court dismissing their claim that the new Pennsylvania congressional redistricting map is an unconstitutional partisan gerrymander. In its opinion, the court held that Democratic voters are an "identifiable political group," J.S. App. 21a,[2] but the plaintiffs had not alleged sufficient discriminatory effects burdening that group to satisfy the requirements of *Davis v. Bandemer*, 478 U.S. 109 (1986), J.S. App. 21a-28a. Cross-appellants raise two issues. First, they ask the Court to overturn *Davis v. Bandemer* altogether and find political gerrymandering claims nonjusticiable. Second, they ask the Court, in the process of reinterpreting the phrase "identifiable political group," to reject appellants' political gerrymandering claims because of the existence of

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[1]For a more complete statement of this case, please refer to the Jurisdictional Statement filed in No. 01-1873.

[2]"J.S. App." cites are to the appendix to the Jurisdictional Statement in No. 01-1873.

cross-over voting in Pennsylvania. Although plaintiffs believe the district court's ultimate dismissal of their political gerrymandering claims was incorrect as a matter of law, *see* J.S. in No. 01-1873, the two issues raised in this conditional cross-appeal involve wholly unremarkable applications of well-established doctrines, as to which the district court did not err.

REASONS TO DISMISS

This cross-appeal is improper. Cross-appellants are appealing an order – the order dismissing the partisan gerrymandering claims – that they fully support and do not seek to alter. They are merely seeking to assert alternative bases for affirmance. A cross-appeal is not necessary for that purpose, as an appellee may defend a judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered" by the lower court. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Cross-appellants, moreover, have offered no persuasive reasons for this Court to revisit the justiciability of political gerrymandering claims under *Davis v. Bandemer*, nor have they established the need to reinterpret the meaning of "identifiable political group." Their arguments rest upon the mere recitation of decades-old concurrences and dissents from this Court and provide no factual or legal support from the intervening years that would cast any doubt on the two well-settled issues presented in cross-appellants' Jurisdictional Statement.

I. THE CROSS-APPEAL SHOULD BE DISMISSED.

In a multitude of cases, this Court has made clear that there is no need for an appellee or respondent to file a cross-appeal or cross-petition if it merely is seeking to preserve alternative legal theories supporting the judgment below that were not accepted by the lower court. *See* Robert L. Stern, *et al.*,

Supreme Court Practice § 635 (8th ed. 2002) (citing cases). Such legal theories are appropriately offered in the initial appeal as alternative bases for affirmance. But the appellee – seeking no alteration in the ruling it is defending – has no standing or reason to take on the role of cross-appellant. This cross-appeal should therefore be dismissed.

II. PARTISAN GERRYMANDERING CLAIMS ARE, AND SHOULD REMAIN, JUSTICIABLE.

The legal theories presented in this cross-appeal should be rejected. First, cross-appellants offer no innovative or compelling argument to support their request that this Court overrule *Davis v. Bandemer*, 478 U.S. 109 (1986). Rather, cross-appellants simply rehash arguments from a long-settled debate. The law in this area is clear – political gerrymandering claims are justiciable – and cross-appellants provide no reason for this Court to revisit that conclusion.

Cross-appellants rely on a purported lack of judicially manageable standards and a fear of political instability in support of their request to overturn *Bandemer*. *See* J.S. on Condit. Cross-App. at 8-11. The majority in *Bandemer*, however, considered and rejected that very argument. *See Bandemer*, 478 U.S. at 125. That some lower courts since *Bandemer* have confused matters by imposing unattainable requirements on political gerrymandering claims, *see* J.S. in Case No. 01-1873, at 13-23, does not impugn the holding of the *Bandemer* majority that such claims are justiciable. As the majority opinion made clear – and as argued in the Jurisdictional Statement filed in Case No. 01-1873 – it is certainly possible to adjudicate limited, manageable political gerrymandering claims that seek "a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status." *Bandemer*, 478 U.S. at 125 n.9. In any

event, the *Bandemer* decision has not produced anything like the "havoc" and "political instability" described by cross-appellants. *See* J.S. on Condit. Cross-App. at 10.

In seeking to overturn *Bandemer*, cross-appellants point to no decision of this Court (nor of any lower court) casting serious doubt on *Bandemer*.[3] If anything, recent decisions of this Court underscore the continued importance of limiting legislative overreaching by the States in the redistricting arena.

For example, the Court has held that States may not use their limited Article I power to dictate electoral outcomes, to advantage one class of candidates over another, or to frustrate the will of the majority of voters. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001); *see also Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The same principles require stringent limits on the power of legislatures to predetermine the results of congressional voting through strategic line-drawing.

In addition, recent decisions by this Court clarifying racial gerrymandering law support the continued vitality of political gerrymandering claims. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993) (holding unconstitutional those districting plans where race trumps traditional districting principles). Just as race may not predominate over traditional districting principles, neither should political parties draw district lines that advantage or disadvantage a group of voters while substantially disregarding traditional districting principles.

The *Bandemer* Court wisely recognized that, as with racial gerrymanders, the Constitution imposes certain limits on "invidiously discriminatory" partisan gerrymanders. *See Bandemer*, 478 U.S. at 125 (majority opinion). The continued

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[3]Nor do they cite any recent scholarship urging such a result.

justiciability of political gerrymandering claims helps preserve the basic constitutional principle, recognized in *Bandemer*, that "each political group in a State should have the same chance to elect representatives of its choice as any other group." *Id.* at 124.

III. CONSISTENT WITH THE REQUIREMENTS SET FORTH IN *BANDEMER*, PLAINTIFFS IN THIS CASE ARE MEMBERS OF AN IDENTIFIABLE POLITICAL GROUP.

Cross-appellants also urge this Court to refine the meaning of "identifiable political group" for purposes of alleging a valid partisan gerrymandering claim. According to cross-appellants, the group allegedly harmed in this case – defined to include voters who actually vote for Democratic candidates in general elections for Congress – cannot constitute a salient political group under *Bandemer*. Cross-appellants offer no rationale as to why additional guidance in this area is necessary, nor can cross-appellants cite a single lower-court decision indicating any difficulty with the idea of identifying a salient political group. The district court's resolution of this issue was entirely proper.

The three-judge panel in this case had no trouble dispensing with cross-appellant's "identifiable political group" contention, concluding, "Plaintiffs must allege only that they are members of an identifiable political group whose geographical distribution is sufficiently ascertainable that it could have been used in drawing electoral lines. Clearly, by alleging that they are Pennsylvania citizens who vote for Democrats, Plaintiffs have satisfied this requirement." J.S. App. 21a. The district court's conclusions find ample support in existing case law, and neither precedent nor logic suggests a contrary result.

Initially, *Bandemer* itself belies any claim that the instant case does not involve an identifiable political group. There, the Court found that the plaintiffs – whom the district court had described as "clearly belong[ing] to a politically salient class, those who *align* themselves with the Democratic Party," *Bandemer v. Davis*, 603 F. Supp. 1479, 1492 (S.D. Ind. 1984) (three-judge court) (emphasis added) – had stated a justiciable claim. *Bandemer*, 478 U.S. at 124. In *Bandemer*, this Court considered the same type of class as that identified in this case – one based on how people vote, rather than on their party registration – and found that such claims were cognizable under the Equal Protection Clause.

Moreover, the fact that not all *registered* Democrats always vote for Democratic candidates, *see* J.S. on Condit. Cross-App. at 16, hardly means that plaintiffs here are not an identifiable political group. *Cf. Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n.23 (4th Cir. 1993) (holding that registered Republicans and Democrats who allege that they "have and will continue to vote for Republican candidates" have alleged "a sufficient degree of cohesiveness . . . in order to withstand a motion to dismiss"). It is voter performance, not voter registration, that establishes a politically salient class.

Not surprisingly, in the related context of racial gerrymandering, this Court has held that it is how people vote, rather than registration figures like those referenced by cross-appellants, that is critical to analyzing whether lines were based on race or politics. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 244-45 (2001) (noting that testimony at trial showed high level of cross-over voting, and thus voter registration figures did "not accurately predict preferences at the polls"); *id.* at 245 ("A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior.").

The focus on how people vote, rather than their registration, is supported not only by redistricting cases, but also by more general equal protection case law concerning discrimination based on political beliefs. The Equal Protection Clause protects those who vote Democratic just as much as it protects those who register as Democrats. It is no more permissible, for example, to fire civil servants who tend to vote Democratic than it is to fire those who register with the Democratic Party. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 509-10 & n.4 (1980) (striking down patronage system that discriminated against those registered as Republicans and those, including the named plaintiff, who registered as Democrats but were "regarded" as Republicans); *Elrod v. Burns*, 427 U.S. 347, 351 (1976) (plurality opinion). Any other result would mean that the government would be free to discriminate against people based on how they *actually* vote because such a class is not protected by the Equal Protection Clause.

Finally, the simple political realities of this case bolster the notion that those tending to vote Democratic form a politically salient class for purposes of a *Bandemer* claim. As alleged by plaintiffs in this case, the Republican-controlled Pennsylvania General Assembly enacted a congressional map with many bizarrely shaped districts that honor none of the traditional redistricting criteria, including respect for communities of interest, municipal boundaries, incumbency protection, etc. *See* Case No. 01-1873, J.S. App. 116a-134a (complaint); *id.* 135a-137a (maps of Act 1). Recognizing the primary importance of voting patterns, rather than voter registration, the General Assembly created meandering districts with the single-minded goal of maximizing Republican advantage in the State's congressional delegation. *Id.* In so doing, they recognized the significance of Democratic voters as an identifiable group that needed to be "packed" and "fractured" to maximize bias in

favor of Republican candidates. It ill behooves cross-appellants, having orchestrated such a scheme, to come into court and deny that their intended victims are "identifiable."

CONCLUSION

For the foregoing reasons, the court should note probable jurisdiction in No. 01-1873 and dismiss the conditional cross-appeal as unnecessary and improper.

Respectfully submitted,

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181